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BENTON COUNTY CLERK

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FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF BENTON

CENTURION PROPERTIES III, LLC SMI  
GROUP XIV, LLC,

Plaintiffs,

v.

TOM HAZELRIGG III; AARON  
HAZZELRIGG, ; PATRICK McCOURT;  
BARCLAY'S NORTH, INC; NICOLE  
KELLY; DANIEL A KIRBY; Trustee - JIM  
DENTON; EQUITY FUNDING, LLC;  
CENTRUM FINANCIAL; TRIDENT  
INVESTMENTS; EVERGREEN BANK;  
and JOHN DOES 1-10,

Defendants.

NO. 10-2-00301-8

**RESPONSE TO EQUITY  
FUNDING'S OBJECTION TO  
MOTION FOR PRELIMINARY  
INJUNCTION**

**A. Summary of Argument in Response**

There are but a few facts in dispute as to how Tom Hazelrigg and Equity Funding were able to place five liens, in violation of the recorded GE loan covenants, as well as in violation of the Plaintiff's LLC agreement, totaling about \$50,000,000 on the Battelle property. What is now clear and undisputed is that:

1       • Hazelrigg borrowed money from Equity Funding using a different corporate entity and *not*  
2  
3 the Plaintiff, Centurion Properties III, LLC, a Washington Limited Liability Company. That  
4 company and the ensuing foreclosure are upon a "Delaware Limited Liability Company". This is  
5 conceded in Exhibits 7 and 8 to the Elizabeth Baker declaration where both the loan and deed of  
6 Trust are made to Centurion Properties III, LLC "a Delaware Limited Liability Company".

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8       • Equity Funding does not dispute that it knew from the beginning that GE would not allow  
9 secondary financing on the Battelle property. That explains, in part, why an extended period of time  
10 went by before the encumbrances were placed on the Battelle property.

11  
12       • Equity Funding had the Centurion Properties III, LLC agreement in its possession before  
13 making the initial loan(s) to Hazelrigg which specifically disallowed secondary financing. Baker  
14 Declaration ¶5.

15  
16       • Equity Funding relied upon (and still has) security owned by Hazelrigg in New Mexico,  
17 *not* the Battelle property, in Benton County, when making loans to Hazelrigg. Baker Declaration ¶5.

18  
19       • The \$50,000,000+ worth of liens placed on the Battelle property in no way relate to the  
20 initial purchase money obtained to acquire the property, although possibly Hazelrigg used some of  
21 the money he borrowed from Equity Funding to make his contribution.

22  
23       • Equity Funding did not rely upon the "consent" as it was not even drafted until March  
24 2008 and was back dated. See Henry Declaration, 2/18/10 (2<sup>nd</sup> Henry Declaration) Exhibit 1  
25 regarding when it was prepared by Plaintiff's attorney. Indeed, Equity Funding, expected the title  
26

1 company (and did not make any attempt itself) to verify that Hazelrigg had authority to consent to  
2 these liens. See Baker Declaration ¶6.

3       • There is no dispute that Hazelrigg told SMI that he would use his own money for the  
4 down payment and the LLC provisions (¶9.9) merely allowed Hazelrigg to get that back as loan  
5 repayment rather than as taxable income. In fact there are notes to Hazelrigg that SMI repaid. See 2nd  
6 Henry Declaration.  
7

8       • Hazelrigg represented to Henry that he needed the "consent" to refinance the senior GE  
9 loan not to encumber the property. Equity Funding's quote from the form in the memo is not accurate.  
10 The "on Centurion's property" language from the form, quoted in the factual background part of EF's  
11 memorandum is not from the consent form itself (memo in opposition at p. 5-6) and was represented by  
12 Hazelrigg to be for obtaining a refinance of the senior GE loan. The quote from Baker's Declaration,  
13 p.3, ¶5 is not accurate.  
14

15       • Equity Funding and its related companies (Trident Investments, and Centrum Financial)  
16 have no plausible explanation why the multitude of other liens were placed on the property which  
17 stripped all equity from the property.  
18

19       • It appears that Equity Funding still retains its security in other Hazelrigg properties  
20 including those located in New Mexico. Baker Declaration, ¶5.  
21

## 22 **B. LEGAL ARGUMENT IN RESPONSE**

### 23 **1. There is no elevated burden of proof to enjoin a non-judicial foreclosure.**

24 Washington's Deed of Trust Act (the "Act") permits the Plaintiffs, as a borrower, to restrain  
25 trustee's sale "on any proper legal or equitable ground". RCW 61.24.130(1). The Act has been  
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27

1 construed to further three basic objectives that warrant granting Plaintiffs' motion on the evidence  
 2 provided: (1) the nonjudicial foreclosure process should remain efficient and inexpensive; (2)  
 3 provide an adequate opportunity for interested parties to prevent wrongful foreclosure; and, (3)  
 4 promote the stability of land titles. *Cox v. Helenius*, 103 Wash. 2d 383, 387, 693 P.2d 683 (1985);  
 5 *Brown v. Household Realty Corp Co.*, 189 P.3d 233 (2008). The goal of having adequate opportunity  
 6 to prevent wrongful foreclosure, will be frustrated if the Defendants are allowed to foreclose on the  
 7 Plaintiffs' property before the Court ultimately decides the issues of fraud, deceptive practices, and  
 8 damages caused by the defendant's concerted conduct. Moreover, to prevent the wrong that would  
 9 result if the defendants are allowed to strip the Plaintiffs' of their property, the Deeds of Trust Act  
 10 specifically provides this Court with the authority to "restrain, on any proper ground, a trustee's  
 11 sale." RCW 61.24.130 (1). Because the foreclosure process is non-judicial, the foreclosing lenders  
 12 have the ultimate burden of proof as to the elements necessary to support their right to foreclose, just  
 13 as it would in a judicial foreclosure. RCW 61.24.020. See generally, Hoffman, *Court Actions*  
 14 *Contesting the Nonjudicial Foreclosure of Deeds of Trust*, 59 Wash.L.R. 323 (1984)

## 18 **2. There Are Several "Proper Grounds" on Which to Restrain the Foreclosures.**

19 The Defendants and trustee have failed to satisfy statutory prerequisites to foreclosure. The Act  
 20 prescribes detailed, stringent procedures, which the parties must follow for a trustee to sell property  
 21 in a nonjudicial foreclosure sale at a public auction. (See, e.g., RCW 61.24-.010 and .040. 296.)  
 22 *Udall v. T.D. Escrow Servs., Inc.*, 132 Wn. App. 290, 296, 130 P.3d 908 (2006). Because of the lack  
 23 of judicial oversight, courts strictly apply and interpret the Act in favor of the borrower. *Id.* at 297.  
 24

## 26 **3. The Deed of Trust is not properly executed.**

27 It should go without saying that a deed of trust must comply with the formalities necessary

1 for grants of real property. RCW 64.04. A deed to a fictitious person or entity is void. II Washington  
 2 Real Property Deskbook, Sec. 32.4(2). The Deskbook authors state that "...to determine whether  
 3 proper company authority exists to convey [or encumber] property, the LLC agreement should be  
 4 reviewed to determine whether any restrictions or limitations exist. . ." See, id., sec 32.5(4). Here, as  
 5 in the Ace litigation, Equity Funding avoids determining whether the person who signs an  
 6 encumbrance has authority, rather leaving that to a title company. See, Plaintiff's initial motion  
 7 quoting these facts, as well as the Baker Decl. Par. 6, conceding that it lets the title company do the  
 8 checking. Although this may be a technical argument, there is no policy basis to allow a different  
 9 corporate entity to foreclose because the name is "close enough". Here we know that secondary  
 10 financing was not permitted and Equity Funding was aware of this before it loaned money to  
 11 Hazelrigg.  
 12

13  
 14 Also, the fact that the deed of trust being foreclosed was executed by a Delaware LLC, not  
 15 the record owner of the leasehold interests, is a fatal flaw that alone should prevent foreclosure.  
 16

17 **4. Equity Funding participated with Hazelrigg to strip the equity in the Battelle Property.**

18 It cannot be disputed on the records before this court that all of the defendants were aware of  
 19 limitations as to secondary financing, yet, after waiting for an extended period of time, and  
 20 (purposely) without checking to see if Hazelrigg had authority to execute the five liens, placed the  
 21 suspect liens on the property, which were well in excess of any legitimate debt. The RICO statute  
 22 specifically makes "any anticipatory or completed offense" a predicate act triggering a violation of  
 23 the Act. See, RCW 9A82.010(4). Here we have a strong showing of equity stripping, extortionate  
 24 means of collection, attempting to use extortionate means to control a corporation, attempting to  
 25 avoid taxes, falsely encumbering property (this latter offense is a gross misdemeanor, RCW 9.8.020)  
 26 and other instances of fraud. This equity stripping could not have taken place unless all defendants  
 27  
 28

1 participated in the scheme. That Hazelrigg, notified of this motion, has failed to respond or explain,  
 2 supports the Plaintiff in this proceeding.

3  
 4 **5. The LLC Agreement provides that initial investments can be withdrawn as a loan rather than taxable income.**

5  
 6 As explained by Henry, the typical LLC or Corporation usually allows investors to recover  
 7 their investment as loan repayment rather than as ordinary income. The quoted language was for  
 8 that purpose, and Centurion in fact made payments to Hazelrigg entities on promissory notes that  
 9 existed. See, 2nd Henry Declaration


10  
 11 **6. The Insurance face sheets do not impart damaging knowledge to the Plaintiff.**

12 As Michael Henry states in his reply declaration, it is likely that Equity and/or Centrum  
 13 contacted the insurance company directly to get listed on what appears to be a receipt. The binders  
 14 attached to the Overby Declaration only show Centurion as loss payee on the various insurance  
 15 policies.

16  
 17 **C. CONCLUSION**

18 Only Equity Funding can benefit from encumbering the subject property with debt in excess  
 19 of \$25 million of its value. The property cannot be refinanced, cannot be sold, nor can the senior  
 20 debt be extended and, thus, becomes a classic case of equity stripping. The injunction granted last  
 21 week is the only way that the plaintiff's can protect its equity. It should not be vacated.

22  
 23 DATED this 18<sup>th</sup> day of February, 2010.

24   
 25 David A. Leen  
 26 Attorney for Plaintiffs

WSBA #3516

27 DATED this 18<sup>th</sup> day of February, 2010.

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